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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

APEX WHOLESale, INC.,

Plaintiff and Appellant,

v.

FRY'S ELECTRONICS, INC.,

Defendant and Respondent.

D052103

(Super. Ct. No. GIC734991)

APPEAL from a judgment of the Superior Court of San Diego, Yuri Hoffman,
Judge. Affirmed.

In this second appeal in this matter, Apex Wholesale, Inc., individually and as an assignee of the claims of Abacus America, Inc. (Apex), appeals from the court's grant of summary judgment in favor of Fry's Electronics, Inc. (Fry's) on Apex's sole remaining cause of action for intentional interference with prospective economic advantage. The motion for summary judgment came after an initial jury trial, in which the jury found in Fry's favor on all Apex's causes of action. The court resolved Apex's equitable claims in

favor of Fry's, except as to Apex's claim that Fry's advertised the single unit price of goods that only came in multiple units, as to which the court entered a permanent injunction barring such advertisements. Apex and Fry's both appealed. This court reversed the jury's verdict in favor of Fry's on Apex's fourth cause of action for interference, based upon the court's instructional error. (*Apex Wholesale, Inc. v. Fry's Electronics, Inc.* (June 15, 2006, D041383) [nonpub. opn.] (*Apex I.*)) We affirmed the remainder of the judgment.

Following remand, Fry's brought a motion for summary judgment on the remaining cause of action. The court granted the motion, finding (1) it was not precluded from ruling on the motion on the basis of this court's holding there was instructional error in the first trial; (2) Fry's had met its burden of proof of showing there were no triable issues of material fact as to whether Fry's had engaged in independently wrongful conduct that disrupted the economic relationships of Apex; (3) the doctrine of collateral estoppel applied to prevent Apex from relitigating alleged "wrongful conduct" that had been adjudicated in Fry's favor in *Apex I*; (4) Fry's did not waive the right to raise the defense of collateral estoppel; (5) the only remaining potentially viable claim of wrongful conduct was not a part of the intentional interference claim; (6) there was no evidence Apex suffered damages as a result of Fry's allegedly wrongful conduct; and (7) Apex's separate statement was defective as it failed to cite any evidence.

Apex asserts the court erred in granting summary judgment in favor of Fry's because (1) the doctrine of "law of the case" precludes summary judgment of the interference claim; (2) Fry's waived the right to rely on the doctrine of collateral estoppel

because it was not raised as an affirmative defense nor properly set forth in the motion; (3) collateral estoppel was not available because there has been no final judgment in this case and it is barred by the doctrine of law of the case; (4) Fry's separate statement of undisputed facts did not comply with Code of Civil Procedure¹ section 437c; (5) Apex should have been granted a continuance to submit a proper separate statement of undisputed facts; and (6) there are undisputed materials facts to support each element of the cause of action. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Because we have addressed the factual and procedural background leading up to the appeal in *Apex I* in the unpublished decision in that case, we take the factual and procedural background up to the time of that first appeal largely from our decision in that matter.

A. The Parties

Apex is a wholesale and retail seller of computers and computer parts. Apex was incorporated in the late 1980's to act as the "mother ship" of several predecessor business entities, the names of which became fictitious business names of Apex. Fry's is a retailer of electronics, including computers and computer parts. In 1997 Fry's opened a store in San Diego. Randy Fry is a founder, officer, and director of Fry's, and David Bicknell was a manager of Fry's San Diego store.

¹ All further statutory references are to the Code of Civil Procedure unless otherwise specified.

B. The Pleadings

In December 1999 Apex filed a second amended complaint against Fry's, Randy Fry and Bicknell, that included causes of action for (1) violations of the Unfair Practices Act (UPA) (Bus. & Prof. Code, § 17000 et seq.); (2) false advertising (Bus. & Prof. Code, § 17500); (3) unfair competition (Bus. & Prof. Code, § 17200); and (4) intentional interference with prospective economic advantage.² The first cause of action for violations of the UPA alleges that Fry's unlawfully sold items as loss leaders, advertised items for sale at prices below their replacement or invoice cost, and engaged in discriminatory pricing between its San Diego store and other stores throughout California.³ The second cause of action for false advertising includes allegations that Fry's engaged in "bait and switch" tactics; advertised items at after-rebate prices without adequately disclosing the uncertainty of receiving the rebate or that sales tax would be charged on the full in-store price; misled customers regarding the terms of extended warranties (called "Performance Guarantees") they purchased; and represented that certain merchandise carried a manufacturer's warranty without disclosing that the warranty was shorter than normally provided by the manufacturer or that the manufacturer was insolvent and unable to honor the warranty.

² A fifth cause of action for negligent interference with prospective economic advantage was dismissed before trial.

³ References to "Fry's" in connection to the first, second and third causes of action include Randy Fry. The fourth cause of action was brought against the corporate defendant only.

The third cause of action for unfair competition is largely based on the wrongful acts alleged in the first and second causes of action. In addition, the third cause of action alleges that Fry's advertised secondhand or refurbished goods as new, and "advertis[ed] consumer goods which are sold only in multiple units but which are advertised at prices that are different than the minimum multiple unit price, a practice prohibited by [Business and Professions Code s]ection 17504."

The fourth cause of action for intentional interference with prospective economic advantage, alleged only as against Fry's, is based on the wrongful acts alleged in the preceding causes of action and alleges that Fry's "intentionally committed various wrongful acts" that damaged Apex by disrupting its relationships with its customers.

C. Bicknell's Motion for Summary Adjudication

Before trial, Bicknell moved for summary adjudication of the first, second and third causes of action on the ground he could not be held vicariously or secondarily liable for the wrongful acts alleged in those causes of action. The court granted the motion as to the first cause of action, ruling Bicknell could not be held liable under that cause of action because the evidence showed he "had no authority regarding Fry's price setting policy."

D. Trial Proceedings: Phase I

The first phase of the bifurcated trial was a jury trial on the first cause of action for violations of the UPA and fourth cause of action for intentional interference with prospective economic advantage.

1. Jury instructions on interference claim

At the request of counsel for Fry's, the court gave a limiting instruction on the fourth cause of action for interference with prospective economic advantage, which in relevant part stated, "I will decide whether Fry's engaged in false advertising and whether Fry's engaged in unfair competition," and also stated, "Regarding the fourth cause of action, you may consider this evidence, but only to the extent that it may bear on Fry's intent to interfere with the relationship between [Apex] and its customers. Do not consider this evidence for any other purpose."

The court read the limiting instruction to the jury twice—first, during Apex's case-in-chief and a second time when it instructed the jury before deliberations. The limiting instruction was included in the written instructions the jury took into deliberations.

In connection with Apex's fourth cause of action for intentional interference with prospective economic advantage, the court also instructed the jury on the privilege of competition under a modified version of BAJI No. 7.86, and instructed on the definition of "wrongful means" or "wrongful conduct" with a modified version of BAJI No. 7.86.1, which directed it to consider whether Fry's engaged in independently wrongful conduct in the form of false advertising and unfair competition.

2. Jury's Verdict

The jury filled out three special verdict forms addressing Apex's claims of below cost sales and loss leaders, locality discrimination, and prospective economic advantage, respectively. Fry's prevailed on all of these claims. Although the jury found Fry's sold merchandise below cost in San Diego, it answered "yes" to the question, "Has Fry's

proved, by a preponderance of the evidence, that in selling merchandise in San Diego below its cost, it did not have the purpose—that is, the conscious and positive desire—of injuring competitors or destroying competition?" On the locality discrimination verdict form, the jury found Fry's sold merchandise in San Diego at a lower price than in other locations at the same time, but answered "yes" to the question, "Has Fry's proved, by a preponderance of the evidence, that in selling merchandise in San Diego at a lower price than in other locations, it did not have the intent of injuring competitors or destroying competition, and that it did not know, to a substantial certainty, that this result would occur?"

The "Special Verdict Re Interference" form asked in "Question Number 4" if Fry's committed "intentional acts that were designed to disrupt, and that did actually disrupt, the relationship between [Apex] and its customers" It further directed that if the jury found under "Question No. 4" that Fry's committed intentional acts that were designed to and actually did disrupt the economic relationship between Apex and its customers, it was to answer "Question No. 5," which read:

"Were the acts committed by Fry's that disrupted the relationship between [Apex] . . . and its customers independently wrongful for one or more of the following reasons? [¶] a. Fry's advertised merchandise without intending to sell it; or [¶] b. Fry's used deceptive advertising; or [¶] c. Fry's sold secondhand merchandise as new."

The jury answered "yes" to question No. 4 and "no" to question No. 5, resulting in judgment in Fry's favor on Apex's fourth cause of action for intentional interference with prospective economic advantage.

The jury also found in Fry's favor on the first cause of action for alleged violations of the UPA.

E. Trial Proceedings: Phase II

Following the jury phase of the trial, the court heard evidence and argument on the equitable (i.e., second and third) causes of action for false advertising and unfair competition. The court initially issued a "Statement of Intended Decision" finding in favor of defendants on all of the claims asserted under those causes of action. However, after Apex objected to the court's proposed statement of decision, and a statement of decision prepared by Fry's, the court entered a judgment that permanently enjoined Fry's and Randy Fry from violating Business and Professions Code section 17504 by advertising the single unit price of goods sold only in multiple units unless the advertisement disclosed the multiple unit price at least as prominently as the single unit price. The court rendered judgment in favor of Fry's and Randy Fry's on all of Apex's other claims.

F. Apex I

Apex appealed, attacking those portions of the judgment adverse to it and the court's denial of its posttrial motion for judgment notwithstanding the verdict and motion to vacate portions of the judgment. Fry's and Randy Fry appealed the portion of the judgment permanently enjoining them from violating section 17504.

In June 2006 we issued the 67-page unpublished opinion in *Apex I*. We affirmed the judgment and trial court rulings, with the exception of the intentional interference claim. With regard to that cause of action, we held the court committed instructional

error, and reversed the judgment as to that cause of action only. Specifically, we concluded that the trial court gave the jury inconsistent instructions regarding what evidence could be considered in deciding the interference cause of action. We concluded the jury "was likely confused by the fact that modified BAJI No. 7.86.1 directed it to consider whether Fry's engaged in independently wrongful conduct in the form of false advertising and unfair competition while the limiting instruction directed it *not* to decide whether Fry's engaged in false advertising or unfair competition because the court was to decide those issues."

We further concluded that "[i]n light of the limiting instruction's directive that the jury not decide whether Fry's engaged in false advertising, the jury was likely confused about the inclusion in question No. 5 [of the special verdict] of deceptive advertising as a basis for finding that Fry's interference with the relationship between Apex and its customers (found under question No. 4) was independently wrongful." We also held "[t]he limiting instruction effectively compelled a verdict in Fry's favor on the fourth cause of action by precluding the jury from considering any of Apex's testimonial evidence on the issue of independent wrongfulness. Significantly, the jury found in favor of Apex on Question No. 4, but answered 'no' to Question No. 5, which defeated Apex's fourth cause of action for intentional interference with prospective economic advantage."

G. Remand and Fry's Motion for Summary Judgment

Following our reversal and remand as to the fourth cause of action, Fry's brought a motion for summary judgment as to that claim, asserting (1) Apex could not raise a triable issue of fact as to any element of the interference claim; and (2) on retrial Apex

was barred, under the doctrine of collateral estoppel, from relitigating any allegations of wrongful conduct other than the multiple unit ads.

Apex opposed the motion, arguing (1) summary judgment was precluded by the doctrine of law of the case; (2) there were undisputed material facts to support each element of the fourth cause of action; (3) the doctrine of collateral estoppel did not apply; and (4) Fry's separate statement was defective and should be stricken by the court. However, the separate statement filed in support of Apex's opposition did not admit or dispute any of the facts set forth in Fry's separate statement, or point to any evidence disputing those facts. It also contained several "undisputed material facts," but as to the majority of them, there was no citation to any particular exhibits supporting those "facts."

In its reply points and authorities Fry's pointed out the fact Apex's separate statement did not dispute any of the facts set forth in Fry's separate statement, and therefore there were no triable issues of fact on Apex's interference claim.

H. Court's Ruling on Summary Judgment Motion

The court granted the motion, first finding it was not precluded from ruling on the motion based upon this court holding in *Apex I* there was instructional error on the fourth cause of action: "It is clear from the Court of Appeal's ruling that it made a legal determination that the trial court committed an instructional error as to a material element of [Apex's] interference claim. Specifically, the Court of Appeal held that the trial court gave the jury inconsistent instructions regarding what evidence could be considered in deciding the interference cause of action. The Court of Appeal did not, however, make any findings as to the sufficiency of the facts or evidence supporting such cause of action.

Thus, the Court of Appeal['s] ruling does not prohibit this Court from considering the instant Motion on its merits."

The court also concluded the doctrine of collateral estoppel applied to preclude relitigation of the claims decided against Apex in the first trial and on appeal: "[A] defendant does not waive the issue of collateral estoppel by failing to plead it as an affirmative defense, and such issue may be raised for the first time on summary judgment absent a showing of prejudice. Here, there is no prejudice because [Apex] has had a full and fair opportunity to respond to [Fry's] collateral estoppel argument. Moreover, the primary basis for [Fry's] collateral estoppel argument is the trial of the Second Amended Complaint ('SAC'), which occurred after [Fry's] answered the SAC. A party cannot be deemed to have waived a defense in its answer where the defense arises after the filing thereof. Furthermore, the doctrine of collateral estoppel applies because, with one exception (discussed below), the alleged 'wrongful conduct' at issue in the interference cause of action [citation] has already been finally adjudicated in [Fry's] favor [citation]. Because the issue of such 'wrongful conduct' has been fully and finally adjudicated by the Court of Appeal in [Fry's] favor, [Apex] is precluded from re-litigating it."

The court noted, however, that collateral estoppel did not apply "on the issue of [Fry's] advertisements for goods sold only in multiple units Rather, the Court of Appeal found that these advertisements violated [Business and Professions Code section] 17504. Therefore, collateral estoppel does not apply to bar [Apex's] claim that the advertisements amount to 'wrongful conduct' which disrupted its economic relationships."

Nevertheless, the court granted summary judgment as to this allegation as well, finding "it is undisputed that the Multiple Unit Ads are not a basis for [Apex's] interference claim." Further, the court noted that the only evidence submitted as "to any specific person shopping at Fry's on account of [] Fry's Multiple Unit Ads, was the Declaration and trial testimony of Anna Marie Martin, but Martin did not testify that she ever purchased anything from [Apex], or that she had even been aware of [Apex's] stores before she gave her testimony. . . . There is no evidence that Martin would have bought anything from [Apex] but for Fry's Multiple Unit Ads."

The court also found that "[i]t is noteworthy that [Apex] does not dispute any of the alleged 'undisputed material facts' presented in [Fry's] moving Separate Statement, and with respect to the additional alleged 'undisputed material facts' included in [Apex's] opposing Separate Statement, the Court is at a loss to decipher what evidence allegedly supports these facts. . . . [I]t is not the court's responsibility to rifle through the over 30 Exhibits filed in support of [Apex's] Opposition to find where this relevant testimony is located. Despite this fact, the Court did in fact look at the evidence submitted with the Opposition, in an effort to find triable issues of material fact, but failed to find any, as explained herein."

The court also found that "[Apex] has not established it suffered damages caused by [Fry's] alleged interference. . . . [Apex] presents no facts showing that the reason [Apex] customers shopped at Fry's was due to [Fry's] interference with [Apex's] economic advantage. In fact, [Apex] proffers no evidence as to why [Apex] customers also shopped at Fry's."

Finally, the court rejected Apex's counsel's request made at oral argument to allow counsel to file a proper separate statement because the court had considered Apex's opposition and evidence on the merits.

DISCUSSION

I. *LAW OF THE CASE*

Apex asserts this court's holding in *Apex I* that there was instructional error as to the fourth cause of action precluded the court from granting summary judgment under the doctrine of "law of the case." This contention is unavailing.

A. *Applicable Authority*

The law of the case doctrine, which is designed to promote judicial economy, "generally precludes multiple appellate review of the same issue in a single case." (*People v. Gray* (2005) 37 Cal.4th 168, 196.) "Under the law of the case doctrine, when an appellate court 'states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout [the case's] subsequent progress, both in the lower court and upon subsequent appeal.'" (*People v. Barragan* (2004) 32 Cal.4th 236, 246.)

As its name suggests, the law of the case doctrine applies only to an appellate court's decision on a question of *law*; it does not apply to questions of *fact*. (*People v. Barragan, supra*, 32 Cal.4th at p. 246.) Moreover, it applies "only if the evidence [presented] on retrial or rehearing of an issue is substantially the same as that upon which the [earlier] appellate ruling was based." (*Ibid.*, quoting *People v. Mattson* (1990) 50 Cal.3d 826, 850.) The introduction of new evidence that is materially or substantially

different than that presented in the earlier proceedings will obviate the application of the doctrine. (*Estate of Baird* (1924) 193 Cal. 225, 244.)

B. *Analysis*

The doctrine of law of the case did not prevent the trial court from ruling on Fry's summary judgment motion. The only issue presented and decided in *Apex I* relevant to the fourth cause of action for intentional interference was whether the jury instructions on that claim were erroneous. In reversing that part of the judgment and remanding the matter, we did not decide the merits of the cause of action or the sufficiency of the evidence in support of that cause of action, nor did we expressly or impliedly bar a subsequent motion to summarily adjudicate it.

In arguing that summary judgment was precluded based upon law of the case, *Apex* asserts that in reaching our decision in *Apex I* this court "necessarily evaluated (1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) the indications by the jury that it was misled." Thus, *Apex* argues, in reversing the judgment on this cause of action, we "put to rest the issue of whether or not *Apex* presented sufficient evidence to support its Interference with Prospective Economic Advantage cause of action." However, to the extent that we analyzed the evidence presented at the first trial, this concerned factual issues, which are not governed by the law of the case doctrine. (See *People v. Shuey* (1975) 13 Cal.3d 835, 842 ["The doctrine, as the name implies, is exclusively concerned with issues of law and not fact"]; *Erlin v. National Union Fire Ins. Co.* (1936) 7 Cal.2d 547, 549.) The extent to which factual findings are binding in a later trial between the same parties depends instead on the

applicability of the collateral estoppel doctrine, which we shall discuss in greater detail, *post*. (See *Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1569.)

Likewise, statements made in our prior opinion about evidence presented at the earlier trial cannot be used to substitute Apex's summary judgment burden to produce specific facts showing a material factual issue. The purpose of the summary judgment procedure is to determine whether there are disputed factual issues requiring the process of a trial. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) If a party fails to come forward with evidence of those specific facts, the trial court must necessarily assume that such evidence would not be available at trial. In our prior appellate decision we stated we were remanding the case for a trial on the limited issue of the fourth cause of action for interference with prospective advantage. There is nothing in our decision in *Apex I* suggesting that the parties could rely on evidence produced in the prior trial to establish their respective factual positions at the retrial.

Moreover, law of the case does not apply where the evidence in the new proceeding pertinent to the legal question is substantially different: "[D]uring subsequent proceedings in the same case, an appellate court's binding legal determination 'controls the outcome only if the evidence on retrial or rehearing of an issue is substantially the same as that upon which the appellate ruling was based. [Citations.]' [Citation.] Where, on remand, 'there is a substantial difference in the evidence to which the [announced] principle of law is applied, . . . the [doctrine] may not be invoked.'" (*People v. Barragan, supra*, 32 Cal.4th at p. 246.) Thus, Apex was required to produce evidence in

opposition to Fry's motion for summary judgment showing a triable issue of material fact existed as to the interference claim.

II. *COLLATERAL ESTOPPEL*

Apex next asserts the court erred in relying on the doctrine of collateral estoppel because (1) Fry's waived the defense because it did not plead it in its answer; (2) Fry's separate statement did not set forth all the elements of this defense; (3) collateral estoppel cannot be asserted as there is no final judgment in the case; (4) equitable claims cannot bar Apex's legal claims; and (5) the law of the case doctrine precludes application of collateral estoppel. These contentions are unavailing.

A. *Waiver*

Fry's "did not waive the issue of collateral estoppel by failing to plead it as an affirmative defense, as asserted by appellant. We observe that only the preclusion of relitigation of *claims* pursuant to the principles of *res judicata* is an affirmative defense that must be pled or otherwise raised in the trial court to avoid waiver. [Citations.] '[R]es judicata (precluding the relitigation of claims) must be pleaded, while collateral estoppel (a subset of res judicata precluding the relitigation of issues) need not be.' [Citation.] '[C]ollateral estoppel is waived if not *raised* in the trial court.' [Citation.] Collateral estoppel as a defense need not be alleged in an answer or other responsive pleading, particularly where, as here, the evidence to support it-that is, a prior adjudication of the issue-did not then exist. ' "A defense founded upon the conclusiveness of a former adjudication must be either pleaded *or proved*. [Citations.] Such defense is waived if not

raised *either by the pleadings or the evidence*. [Citations.]" [Citation.]" [Citation.]"
(*Rodgers v. Sargent Controls & Aerospace* (2006) 136 Cal.App.4th 82, 88-89.)

Thus, Fry's did not waive the defense of collateral estoppel because (1) it raised it by way of its summary judgment motion, and (2) it is based upon the trial, judgment and appeal, which all occurred *after* it filed its answer.

B. *Fry's Separate Statement*

Apex asserts that Fry's separate statement filed in support of its motion for summary judgment was defective because Fry's did not set forth the elements of collateral estoppel in that document. However, there is no requirement that the separate statement cite the legal elements of a collateral estoppel defense. The purpose of a separate statement is to set forth *facts*, with citation to evidence, supporting that defense. (*United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 337.) Fry's separate statement properly does so.

C. *Final Decision on the Merits*

Apex asserts "there is no final judgment in this case from which to derive collateral estoppel" because in *Apex I* this court reversed the judgment as to the fourth cause of action. We reject this contention.

First, there need be no final judgment for collateral estoppel to apply. That is required for res judicata, but not collateral estoppel. (7 Witkin, Cal. Procedure (5th ed. 2008) Judgment, § 369, p. 992.) Further, based upon our decision in *Apex I* upholding the trial court judgment as to the first, second and third causes of action, there is a final judgment for collateral estoppel purposes as to the issues adjudicated on those claims.

D. Impact of Equitable Claims on Legal Claims

Apex asserts that the trial court's decision on the equitable claims can have no effect on the legal claims, including the fourth cause of action, which were tried to a jury. Apex is incorrect.

Contrary to Apex's contention, a court's ruling on equitable claims *are* binding on a jury's determination of legal claims. (*Raedeke v. Gibraltar Sav. & Loan Association* (1974) 10 Cal.3d 665, 671.) Moreover, any finding of fact made by a court on equitable issues are binding on a jury determining legal issues. (*Dills v. Delira Corp.* (1956) 145 Cal.App.2d 124, 129-130.) Thus, to the extent there are issues that have been finally adjudicated for collateral estoppel purposes on the equitable claims, there is no bar to applying those final adjudications to the legal claim presented in the fourth cause of action.

E. Denial of Directed Verdict in First Trial

Apex asserts that because the court denied Fry's motion for directed verdict in the first trial, including as to the fourth cause of action, and Fry's did not appeal that decision, under the law of the case doctrine Fry's was barred from asserting there was insufficient evidence in support of the fourth cause of action following remand. We reject this contention.

Apex again ignores the fact that after the directed verdict was denied, judgment was entered in Fry's favor on the first, second and third causes of action, and that judgment has been upheld on appeal. Thus, again, there is a final judgment for collateral estoppel purposes as to the issues adjudicated on those claims, which in turn formed the

basis of the interference claim. The summary judgment motion was brought on grounds that did not exist at the time of the denial of Fry's motion for a directed verdict.

Further, the only effect of Fry's failure to file a protective cross-appeal challenging the court's denial of its directed verdict motion would be that it was precluded from arguing on the first appeal that the court erred in allowing those claims to go to the jury. It had no impact on Fry's right to bring a motion for summary judgment following remand on the interference claim arguing that claim was legally and factually baseless given (1) the judgment in its favor on the other claims; and (2) the lack of any evidence to otherwise support a cause of action for interference.

F. Failure of Court in Apex I To Resolve Issues Raised in that Appeal

At oral argument, counsel for Apex argued that this court's failure to resolve all issues raised by it on the first appeal in *Apex I* precludes application of the doctrine of collateral estoppel. In particular, Apex points to footnote 17, wherein we concluded that based upon our reversal of the judgment on the fourth cause of action because of instructional error, we need not address Apex's other claims of instructional error. This contention is unavailing.

The alleged instructional errors we declined to reach in *Apex I* were also only directed at the fourth cause of action for interference. Thus, the fact that we declined to reach those additional contentions has no impact on the final judgment in Fry's favor on the first, second and third causes of action.

III. *FRY'S SEPARATE STATEMENT*

Apex asserts that Fry's separate statement of undisputed facts was defective because (1) it cited to inadmissible hearsay and opinion evidence; (2) the cited evidence was not relevant to the elements of Apex's interference claim; and (3) the separate statement was not "plain and concise." These contentions are unavailing.

A. Admissibility of Evidence Cited in Separate Statement

Section 437c, subdivision (b)(1) provides in part, "The supporting papers shall include a separate statement setting forth *plainly and concisely* all *material facts* which the moving party contends are undisputed. *Each of the material facts stated shall be followed by a reference to the supporting evidence.* The failure to comply with this requirement of a separate statement may in the court's discretion constitute a sufficient ground for denial of the motion." (Italics added.)

Contrary to Apex's argument, each undisputed fact in Fry's separate statement cites to evidence in support of that fact. In fact, Apex only identifies one undisputed fact (undisputed fact No. 28) that it contends was unsupported by admissible evidence. However, a review of that undisputed fact reveals it was proper and supported by competent evidence.

Undisputed fact No. 28 states, "[Apex] never produced or cited to any evidence, whether in its discovery responses, its proffered testimony at the first trial, or in any pleadings filed with the trial Court, that Fry's Multiple Unit Ads ever disrupted [Apex's] economic relationships." In support of this fact, Fry's cited to Apex's responses to Fry's interrogatories, and the declaration of its own counsel.

The evidence cited is not improper opinion or hearsay. The interrogatory responses are party admissions, which Fry's attorney properly authenticated. (*California School Employees Assn. v. Sunnyvale Elementary School Dist.* (1973) 36 Cal.App.3d 46, 69; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2008) ¶ 9:50a, p. 9(I)-28 (rev. #1, 2007).)

B. *Materiality*

Nor is there any merit to Apex's contention the separate statement lacks materiality because they did not cite the "elements of the cause of action at issue." As explained, *ante*, separate statements set forth facts, not legal elements of a claim or defense.

C. *Plain and Concise Separate Statement*

There is also no merit to Apex's contention the separate statement is not "plain and concise." Apex complains the facts set forth therein are "confusing and long." While some of the undisputed facts are long, it is because that was necessary to make them *complete*. Our review of Fry's separate statement reveals that it was not confusing, and was, as required by section 437c, subdivision (b)(1), "plain and concise."

IV. *APEX'S SEPARATE STATEMENT*

Apex asserts the court erred in failing to continue the hearing on the motion for summary judgment to allow it to correct the defective separate statement it filed in opposition to Fry's motion for summary judgment. We reject this contention.

A. *Background*

As Apex admits, the separate statement it submitted in opposition to Fry's summary judgment motion did not comply with the requirements of section 437c. It

failed to either admit or deny the truth of Fry's undisputed facts and failed to sufficiently identify the evidence in support of Apex's separate statement.

At the hearing on Fry's motion, counsel for Apex requested a continuance to allow it to submit a proper separate statement. The court denied the request.

However, in ruling on the summary judgment motion, the court nevertheless looked past the defects in Apex's separate statement and looked "at the evidence submitted with the Opposition, in an effort to find triable issues of material fact, but failed to find any"

B. *Analysis*

Section 437c, subdivision (b)(3) provides, "The opposition papers shall include a separate statement that responds to each of the material facts contended by the moving party to be undisputed, *indicating whether the opposing party agrees or disagrees that those facts are undisputed*. The statement also shall set forth plainly and concisely any other material facts that the opposing party contends are disputed. *Each material fact contended by the opposing party to be disputed shall be followed by a reference to the supporting evidence*. Failure to comply with this requirement of a separate statement may constitute a sufficient ground, in the court's discretion, for granting the motion." (Italics added.)

Apex relies on *Parkview Villas Assn., Inc. v. State Farm Fire & Casualty Co.* (2005) 133 Cal.App.4th 1197 (*Parkview*) for its contention the court abused its discretion in failing to grant it a continuance to prepare a proper separate statement. Apex's reliance on *Parkview* is misplaced.

In *Parkview*, the Court of Appeal reversed a grant of summary judgment which was based on a " 'lack of admissible evidence in opposition to the motion' " stemming from the plaintiff's " 'inadequate statement of undisputed material facts.' " (*Parkview, supra*, 133 Cal.App.4th at pp. 1201-1202.) The plaintiff's separate statement required the court " 'to comb the 37 pages of declarations and hundreds of pages of attached documents to unearth evidence supporting plaintiff's position.' " (*Id.* at p. 1208.) However, the court and the moving party never brought the deficiencies in the separate statement to the attention of the plaintiff. Rather, the court ruled that the separate statement was deficient for the first time on a motion for reconsideration. (*Ibid.*)

The Court of Appeal concluded the trial court abused its discretion in granting the defendant's motion for summary judgment without providing the plaintiff an opportunity to correct the deficiencies in its separate statement. (*Parkview, supra*, 133 Cal.App.4th at p. 1210.) In reversing the trial court's judgment, the Court of Appeal stated: "The trial court's dissatisfaction with Parkview Villa's failure to file a proper separate statement is understandable Appropriate, limited sanctions for that procedural error are proper; 'terminating sanctions' are not. . . . '[T]he respondent [should be] afforded a reasonable opportunity to file [a proper statement].' " (*Id.* at p. 1216.)

Parkview is readily distinguishable. Here, Fry's objected to Apex's defective separate statement and it thus had the opportunity to correct it prior to the hearing on Fry's motion. More important, despite the deficiencies in Apex's separate statement, the court elected nevertheless to review Apex's evidence submitted in opposition to the motion, and ruled on the merits of the motion. Indeed, this approach was expressly

endorsed by the Court of Appeal in *Parkview*: "It certainly would have been within the trial court's discretion to proceed to the merits of State Farm's motion, notwithstanding Parkview Villa's failure to comply fully with [California Rules of Court] rule 342(f). . . . (See *San Diego Watercrafts [Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 316] [where consideration of evidence not contained in separate statement presents no due process concerns, trial court has discretion to consider the evidence].)" (*Parkview, supra*, 133 Cal.App.4th at p. 1212.)

V. MERITS OF APEX'S FOURTH CAUSE OF ACTION

Apex last asserts there are undisputed facts to support each element of its fourth cause of action. This contention is unavailing.

A. Standards Governing Summary Judgment Motions

A defendant moving for summary judgment bears the burden of persuasion to show either (1) one or more elements of the plaintiff's cause of action cannot be established or (2) there is a complete defense to that cause of action. (§ 437c, subds. (o), (p)(2); *Aguilar v. Atlantic Richfield Co., supra*, 25 Cal.4th at pp. 850-851; *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.) When the motion is based on the assertion of an affirmative defense, the defendant has the initial burden to demonstrate that undisputed facts support each element of the affirmative defense. (*Anderson v. Metalclad Insulation Corp.* (1999) 72 Cal.App.4th 284, 289.) "The defendant must demonstrate that under no hypothesis is there a material factual issue requiring trial. [Citation.] If the defendant does not meet this burden, the motion must be denied. Only if the defendant

meets this burden does 'the burden shift[] to plaintiff to show an issue of fact concerning at least one element of the defense.' " (*Id.* at pp. 289-290.)

On appeal, we independently review the trial court's decision, considering all of the evidence in the supporting and opposing papers and apply the same standard as the trial court. (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037; *Guz v. Bechtel National, Inc.*, *supra*, 24 Cal.4th at p. 334.) We liberally construe the evidence in support of the opposing party, resolving doubts concerning the evidence in its favor (*Yanowitz*, at p. 1037; *Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142), and assess whether the evidence would, if credited, permit the trier of fact to find in its favor under the applicable legal standards. (Cf. *Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 850.) We do not weigh the evidence and inferences, but merely determine whether a reasonable trier of fact could find in the opposing party's favor, and we must reverse the order granting summary judgment when there is some evidence that, if believed, would support judgment in its favor. (*Alexander v. Codemasters Group Limited* (2002) 104 Cal.App.4th 129, 139.)

B. *Analysis*

In order to state a claim intentional interference with economic advantage, a plaintiff must show " "(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional [wrongful] acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant."

[Citations.]' " (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1153.) Moreover, "a plaintiff seeking to recover for alleged interference with prospective economic relations has the burden of pleading and proving that the defendant's interference was wrongful 'by some measure beyond the fact of the interference itself.' " (*Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 392-393, fn. omitted.)

Here, with the exception of the first element (an economic relationship with a third party), Apex has not raised a triable issue of fact as to any required element of its interference claim.

1. *Knowledge*

Although Apex has pleaded in its complaint that Fry's "was aware of the existence of the relationships between consumers of computer parts and assembled systems residing or doing business in the County of San Diego, and Plaintiff . . . ," Apex has produced no evidence in opposition to Fry's motion to support this allegation. Rather, Fry's submitted evidence that it was unaware of Apex's existence prior to the filing of this action. As a result, Fry's also was unaware of any economic relationship between Apex and consumers. As noted, *ante*, Apex did not dispute these facts in its separate statement.

Moreover, Apex's purported "undisputed facts" set forth in its separate statement do not create a triable issue of fact on this issue. In its separate statement, Apex sets forth as one "undisputed material fact," that "[Fry's] knew of the existence of the relationships between [Apex] and its customers." In support of this allegation, Apex's separate statement asserts (1) Apex advertised in Computer Edge magazine; (2) Fry's was aware

of the advertisers in Computer Edge magazine; and (3) Fry's employees and management regularly comparison shopped San Diego computer stores who advertised in Computer Edge magazine.

However, the evidence cited by Apex does not support these "facts." The only support for the second and third "facts" is the testimony of Sean Archer, Fry's San Diego store manager. However, the cited testimony does not establish *any* of those facts, and certainly does not show Fry's knew who Apex was. Rather, the cited testimony states:

"A. Partially, and the other part is newspaper.

"Q. Okay. And on this document, can you tell what information came from where?

"A. Pretty much, yes.

"Q. Okay and a few of them have an ad price; you can tell that comes from an ad price?

"A. No, by who their retailer is and where they advertise; in the paper or if it's a Computer Edge magazine, which is a local newspaper publication."⁴

This testimony does not establish the facts stated in the separate statement, much less that Fry's had knowledge of Apex and its relationships with its customers. Thus, Apex failed to raise a triable issue of fact on this necessary element of its interference claim and the court properly granted summary judgment in favor of Fry's.

⁴ This testimony comes from the first trial and was part of the record on the first appeal. On April 10, 2003, we granted Apex's unopposed motion to take judicial notice of the entire record in *Apex I*.

2. *Intent*

As Fry's has established that it did not know of Apex and its relationships with its customers, Apex also cannot raise a triable issue of fact on the intent element. As stated, *ante*, "to prevail on a cause of action for intentional interference with prospective economic advantage, plaintiff must plead and prove "*intentional* acts on the part of the defendant *designed* to disrupt the relationship." [Citation.]' [Citation.]" (*Kasparian v. County of Los Angeles* (1995) 38 Cal.App.4th 242, 262.) A party cannot commit an intentional act or engage in conduct designed to disrupt a relationship if the party is not aware of that relationship. (*Id.* at p. 261.) Thus, Apex has failed to raise a triable issue of fact on this element as well.

3. *Independently wrongful acts*

The fourth cause of action incorporates by reference the allegedly wrongful acts alleged in the first, second and third causes of action. Thus, with the exception of Apex's allegation Fry's "multiple unit" ads violated Business & Professions Code section 17504, all claims against Fry's were adjudicated against Apex in the prior trial and upheld by this court on appeal. As the trial court properly found, the doctrine of collateral estoppel bars Apex from relitigating these claims. Where there is a second action between the same parties, including a retrial in the same lawsuit on different causes of action, the first judgment operates as an estoppel or conclusive adjudication as to those issues in the second action as were actually litigated and determined in the first action. (*King v. Timber Structures, Inc.* (1966) 240 Cal.App.2d 178, 183-184.)

Turning to the multiple unit ads, Apex, in response to Fry's discovery requests, never produced any evidence Fry's had disrupted its economic relationships based upon those advertisements. The only evidence submitted by Apex as to any person who shopped at Fry's in response to its multiple unit ads was the declaration and trial testimony of Anna Marie Martin. However, Martin did *not* testify that she had ever purchased anything from Apex or that she had even been aware of its stores before she gave her testimony. No evidence was submitted she would have bought anything from Apex but for Fry's multiple unit ads. Thus, Apex has failed to raise a triable issue of fact on this element as well.

4. *Damages*

Because, as discussed, *ante*, Apex produced no evidence Fry's multiple unit ads caused any disruption of its relationships with its customers, Apex also cannot raise a triable issue of fact that it suffered damages as a result of Fry's actions. Further, in response to Fry's discovery, Apex never produced any evidence demonstrating it suffered any damages as a result of Fry's multiple unit ads. Accordingly, Apex's interference claim fails as a matter of law on this basis as well.

DISPOSITION

The judgment is affirmed. Fry's shall recover its costs on appeal.

NARES, J.

WE CONCUR:

BENKE, Acting P. J.

IRION, J.